

Before the
Commission on Common Ownership Communities
for Montgomery County, Maryland
September 18, 2002

in the Matter of	:	
	:	
Collingwood	:	
Homeowners Association, Inc.	:	
	:	Case No. 565-G
Complainant,	:	
	:	
vs.	:	
	:	
Brian Kriese	:	
	:	
Respondent.	:	

DEPARTMENT OF HOUSING
AFFAIRS
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Decision and Order

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing, on September 18, 2002, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended. At the conclusion of the hearing, the record was left open until October 2, 2002, for the submission of additional evidence by the parties.

The duly appointed hearing Panel having considered the testimony and evidence of record, finds, determines and orders as follows:

On March 22, 2002, the Collingwood Homeowners Association, Inc. (hereinafter the "Complainant" or "Association") filed a formal dispute with the Office of Common Ownership Communities against Brian Kriese (hereinafter the "Respondent"). The Complainant alleged that the Respondent violated the Association covenants by erecting or allowing the following structures on the Respondent's property without written approval by the Association: (1) a vegetable garden; (2) an arbor; and (3) a bird-bath. The Respondent contended that the Association lacked authority under the covenants to regulate the aforementioned issues and even if the Association had authority the Association had failed to enforce the covenants in a consistent fashion and should be barred from enforcement against the Respondent.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities and the Commission voted that it was a matter within the Commission's jurisdiction and the hearing date was scheduled.

Findings of Fact

Based on the testimony and evidence of record, the Panel makes the following findings:

1. Brian Kriese is an owner of a lot within the Collingwood Homeowners Association, Inc., ("Association") with such lot more specifically described as 7903 Plum Creek Drive, Laytonsville, Maryland 20879 ("Lot").

2. The Association was created by Articles of Incorporation and a Declaration of Covenants, Conditions and Restrictions (“Declaration”) which was recorded among the land records of Montgomery County, Maryland and which encumber and bind the Respondent’s Lot and other lots and common parcels.

3. Article V, Section 5.01 of the Declaration states, *inter alia*, the following:

No building, fence, wall or other structure shall be commenced, erected or maintained upon the Property, nor shall any exterior addition to or change or alteration therein be made...until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography and conformity with the design concept for the Property by the Board of Directors of the Association, or by a covenant committee composed of three (3) or more members appointed by the Board...

4. Article VI, Section 6.02(m), of the Declaration, Prohibited Uses, provides: “(m) Vegetable gardens shall be maintained only within that portion of a Lot that is screened from view.”
5. Article VI, Section 6.02(h), of the Declaration, Prohibited Uses, provides: “(h) No decorative lawn ornament...shall be erected, used or maintained on any Lot at any time.”
6. The Respondent does not dispute that, without approval by the Association, he caused a portion of his lawn to be tilled and framed with railroad ties (“Plot”) and that, at one time, he planted vegetables therein. He argues, however, that he voluntarily removed any “vegetables” from the area in question and, as a result, the Association had no further authority over this modification to his Lot since landscaping changes are not within the authority of the Association to regulate. Further, Respondent cited other instances where he believed the Association had allowed “vegetable gardens” and, thus, enforcement against him would be unfair and selective.
7. Respondent admits that, without approval of the Association, he installed the arbor (“Arbor”) in dispute but claims that the Arbor is not a “structure” as that word is used in Article V, Section 5.01 of the Declaration and that the Arbor is part of his fence and an entryway to his rear yard. Respondent pointed to one other example of a Lot within the Association where a metal arbor-like gate was installed in a fence and that the existence of such a structure evidenced inconsistent and arbitrary enforcement by the Association.
8. Respondent admits that he has a bird-bath (“Bird Bath”) on his Lot but argues that the Bird Bath does not fall within the prohibition against “lawn ornaments” as the Bird Bath was not located on the “lawn” but in a garden-wooded portion of his Lot. Respondent also admits that the Association expressly modified its policy to allow bird-baths subsequent to the filing of this matter and that the Association had allowed numerous other bird baths on Lots within the Association.
9. As to the Plot, the Association presented testimony that whether or not vegetables were grown in the confines of the Plot, the Association considered the installation of the railroad ties/timbers surrounding or framing the Plot to be “structures” requiring prior approval of the Association. The Association did not present clear testimony as to whether the railroad ties/timbers would have been approved if a proper application had been submitted by the Respondent.

10. As to the Arbor, the Association presented testimony that the location and color of the Arbor was not compatible, in the Association's opinion, with the harmony of external design and location in relation to surrounding structures.
11. As to the Bird Bath, the Association admitted that there were other bird baths on Lots within the Association and that the Association had amended the Association rules to clarify that bird baths were not considered "lawn ornaments" as that term is used in Article VI, Section 6.02(h) of the Declaration.

Conclusions of Law

The Association has the express authority, pursuant to Article V of the Declaration, to approve any exterior additions, changes or alterations to buildings, fences or other structures on the Property, including on the Respondent's Lot.

As to the Plot, the evidence supports the Association's position that Respondent never received approval for the installation of timbers/railroad ties surrounding the Plot. The panel finds that the railroad ties/timbers are "structures" as that term is used in Article V, Section 5.01 of the Declaration and not merely "landscaping" as Respondent argues. As a result, prior approval from the Association was required before installation of the railroad ties/timbers. The panel did not need to reach a conclusion on whether the Plot violated the "vegetable garden" restrictions found in Article VI, Section 6.02(m) of the Declaration given Respondent's affirmation that he had previously stopped and would not again use the Plot for growing vegetables. Since the restrictions governing "vegetable gardens" was not at issue, whether or not there were other "vegetable gardens" within the Association was not relevant to the panel's decision.

As to the Arbor, the panel finds that the arbor clearly was a "structure" as that term is used in Article V, Section 5.01 of the Declaration and prior approval from the Association was required before installation. The panel also finds that the Association would not approve of the Arbor if an application were submitted. The evidence presented by the Respondent regarding another arbor on the Property was insufficient to establish that the Association's position with respect to the Respondent's Arbor was arbitrary or capricious.

As to the Bird Bath, the panel finds that the existence of other examples of bird baths within the Association as well as the Association's own modification of its rules to expressly exempt bird baths from the definition of "lawn ornaments", as used in Article VI, Section 6.02(h) of the Declaration, evidences the fact that the Association has consistently allowed such structures. As a result, the panel finds that the maintenance of the Bird Bath on the Respondent's Lot is not in violation of the Association covenants or rules.

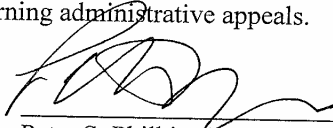
Order

In view of the foregoing, and based on the evidence of record, it is, on this 20th day of December, 2002, hereby Ordered by the Commission Panel that:

1. The Respondent must, within thirty (30) days from the date of this Order, submit an application to the Association for the Plot and, in particular, for the installation of the railroad ties/timbers making up the border of the Plot.
2. The Respondent shall remove the Arbor within thirty (30) days from the date of this Order.

The foregoing was concurred in by panel members Philbin, Gaffigan and Bruce.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order under the Maryland Rules of Procedure governing administrative appeals.

A handwritten signature in black ink, appearing to read 'P. Philbin', written over a horizontal line.

Peter S. Philbin, Panel Chair
Commission on Common
Ownership Communities